Supreme Court, U.S.
FILED
DEC 13 2001

Nos. 00-1751, 00-1777, and 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

SENEL TAYLOR, ET AL., PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
*NORMAN J. CHACHKIN
JAMES L. COTT
DENNIS D. PARKER
ELISE C. BODDIE
DEREK R.B. DOUGLAS
LIA B. EPPERSON
DAMON T. HEWITT
CHINH Q. LE
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013-2897
(212) 965-2200
**Counsel of Record*

(Listing of Counsel continued inside cover)

BEST AVAILABLE COPY

(Listing of Counsel continued from cover)

DENNIS COURTLAND HAYES
GENERAL COUNSEL
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE
4805 Mt. Hope Drive, 5th Floor
Baltimore, MD 21215
(410) 486-9191

KIMBERLY WEST-FAULCON
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
Suite 1480
1055 Wilshire Boulevard
Los Angeles, CA 90017
(213) 975-0211

Counsel for Amici Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici* 1

Summary of Argument 3

ARGUMENT —

Introduction 3

I **The Voucher Program Involved In This Action Was Neither Designed, Nor Can It Operate, To Fulfill The Promise Of *Brown* For African-American Pupils In The Cleveland Public Schools, The Same Class Of Students Found By The Federal Courts To Have Suffered From Long-Maintained *De Jure* Segregation In The Cleveland Public Schools** 6

II **Private School Tuition Voucher Programs Such As The One Involved In This Case Contain The Seeds Of Educational Resegregation And Lack Safeguards To Prevent This Result** 13

Conclusion 18

TABLE OF AUTHORITIES

Page

Cases:

Board of Education of Oklahoma City Public Schools v. Dowell,
498 U.S. 237 (1991) 15

Brown v. Board of Education,
347 U.S. 483 (1954) ..... *passim*

Brown v. South Carolina State Board of Education,
296 F. Supp. 199 (D.S.C.), *aff'd per curiam*,
393 U.S. 222 (1968) 14n

Cappachione v. Charlotte-Mecklenburg Schools,
57 F. Supp. 2d 228 (W.D.N.C. 1999),
aff'd in part and rev'd in part en banc sub nom. Belk v. Charlotte-Mecklenburg Board of Education, 2001 U.S. App. LEXIS 10712
(4th Cir. 1001) 16

Coffey v. State Educational Finance Commission,
296 F. Supp. 1389 (S.D. Miss. 1969) 14n

Columbus Board of Education v. Penick,
443 U.S. 449 (1979) 15

Cooper v. Aaron,
358 U.S. 1 (1958) 15

Dayton Board of Education v. Brinkman,
443 U.S. 526 (1979) 15

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

DeRolph v. State,
93 Ohio St. 3d 309, 754 N.E.2d 1184 (2001) 2

DeRolph v. State,
89 Ohio St. 3d 1, 728 N.E.2d 993 (1999) 2

DeRolph v. State,
78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) 2

Eisenberg v. Montgomery County Public Schools,
197 F.3d 123 (4th Cir. 1999), *cert. denied*,
146 L. Ed. 2d 312 (2000) 16

Freeman v. Pitts,
503 U.S. 467 (1992) 4, 5, 9, 15-16

Green v. County School Board of New Kent County,
391 U.S. 430 (1968) 15

Griffin v. State Board of Education,
296 F. Supp. 1178 (E.D. Va. 1969) ... 14n, 16n-17n

Lee v. Macon County Board of Education,
267 F. Supp. 458 (M.D. Ala. 1967) 14n

Milliken v. Bradley,
418 U.S. 717 (1974) 15

Missouri v. Jenkins,
515 U.S. 70 (1995) 12n, 15, 16

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Poindexter v. Louisiana Financial Assistance Commission,
275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968) 14n

Reed v. Rhodes,
662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) 8

Reed v. Rhodes,
455 F. Supp. 569 (N.D. Ohio 1978), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) 8

Reed v. Rhodes,
455 F. Supp. 546 (N.D. Ohio 1978), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) 8

Reed v. Rhodes,
422 F. Supp. 708 (N.D. Ohio 1976), *remanded per curiam*, 559 F.2d 1220 (6th Cir. 1978), *supplemental opinion on remand*, 455 F. Supp. 569 (N.D. Ohio 1978), *aff'd in relevant part and remanded on other grounds*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 455 U.S. 935 (1980) 8

San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973) 12n, 16

TABLE OF AUTHORITIES (continued)

Page

Cases (continued):

Swann v. Charlotte-Mecklenburg Board of Education,
402 U.S. 1 (1971) 4, 15

Tuttle v. Arlington County School Board,
195 F.3d 123 (4th Cir. 1999) 16

Wessman v. Gittens,
160 F.3d 790 (1st Cir. 1998) 16

Statutes:

Ohio Rev. Code § 3313.977 10

Other Authorities:

Brief for the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Respondents, *Adarand Constructors, Inc. v. Mineta*, 2000 U.S. Lexis 10814 (U.S. November 27, 2001) (No. 00-730) 14

Brian P. Gill, Michael Timpane, Karen E. Ross, and Dominic J. Brewer, Rhetoric Versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools (Rand Corp. 2001), available at http://www.rand.org/publications/MR/MR1118 (visited Dec. 9, 2001) 10n, 11, 14n

TABLE OF AUTHORITIES (continued)

Page

Other Authorities (continued):

Joint Appendix, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) 6n-7n, 9

Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 Tenn. L. Rev. 359 (1997) 11, 13n

Zach Schiller, Policy Matters Ohio, *Cleveland School Vouchers: Where the Students Come From* (2001) (available at http://www.policymattersohio.org) (visited Dec. 4, 2001) 11

Piet van Lier & Caitlin Scott, *Fewer choices, longer commutes for black voucher students*, Catalyst for Cleveland Schools, Oct/Nov 2001, <http://www.catalyst-cleveland.org/10-01/1001extra4.htm> (visited Nov. 27, 2001) 6n-7n

INTEREST OF *AMICI*[*]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to black persons suffering injustice by reason of racial discrimination. For six decades, LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination, including in the seminal case of *Brown v. Board of Education*, 347 U.S. 483 (1954).

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared before courts throughout the nation in numerous civil rights cases.

Throughout their existence, LDF and the NAACP have worked to redeem the guarantee of equal protection of the laws. In no area have they placed higher priority than on education — especially in public schools, where the overwhelming majority of African-American students have been and will continue to be enrolled. In the struggle for an equal and quality education

---

[*]All parties have consented to the filing of briefs *amici curiae* in support of any party's position. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

for these pupils, the impact of racial segregation and concentrated poverty have been daunting impediments. No individuals or institutions have brought these issues to this Court more often than LDF and the NAACP, with the hope that this Court would remove the barriers that impede the process of undoing the effects of centuries of discrimination that have systematically and systemically limited educational opportunity for African-American children.

The enrollment in the Cleveland public school system today is nearly three-quarters African-American. For generations, the Cleveland district practiced intentional racial discrimination and segregation that limited educational opportunities for African-American children. Today, the system suffers from financial shortfalls associated with deficiencies in Ohio's school funding mechanism, *see DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997); *id.*, 89 Ohio St. 3d 1, 728 N.E.2d 993 (1999); *id.*, 93 Ohio St. 3d 309, 754 N.E.2d 1184 (2001). As Petitioners' briefs in these cases indicate, the school system continues to struggle to provide minimally adequate educational opportunities to its students, let alone high-quality results.

Against this background, LDF and the NAACP believe, Ohio's decision to address Cleveland's desperate needs by enacting a program that pays a limited amount toward private sectarian schools' tuition charges for a limited number of Cleveland students raises grave dangers of dissipating resources that are essential to the preservation and ultimate improvement of public education in Cleveland and of fostering the resegregation of schooling in Cleveland (developments completely inconsistent with the purposes of the *Brown* decisions). Because Petitioners have urged the Court to uphold Ohio's private school voucher program on the theory that such action will bring to fruition the goals of *Brown v. Board of Education*, an assertion we find so unlikely as to be nearly

frivolous, LDF and the NAACP file this brief in support of the right of *every* child within the Cleveland Public School System to a quality education.

SUMMARY OF ARGUMENT

The voucher program at issue before this Court should not be upheld against a First Amendment challenge on the ground that the improvement it will bring to the education of African-American students now attending Cleveland's public schools outweighs Establishment Clause concerns. Structural and funding limitations make hollow any hope or expectation that the vouchers awarded by lottery to a small number of Cleveland students under this program will fulfill *Brown*'s promise of "equal educational opportunity" for all.

Moreover, the program — especially if it is expanded or modified to loosen constraints on choice — creates serious dangers of increased school segregation of publicly funded education in the Cleveland area, particularly distressing in light of the long-maintained *de jure* racially segregated system previously operated by the Cleveland public schools.

ARGUMENT

Introduction

The precise issues presented in these cases involve the permissibility of unrestricted state tuition assistance to pervasively sectarian institutions offering elementary and secondary education. LDF and the NAACP believe that the compelling doctrinal considerations warranting affirmance of the ruling below on those issues will be fully and adequately presented to the Court by Respondents and other *amici* filing in support of Respondents.

We therefore limit our observations to one aspect of the grounds asserted by Petitioners to support their requests that the

judgment below be reversed. Specifically, Senel Taylor *et al.*, Petitioners in No. 00-1779, seek to persuade this Court that reversal would not only be consistent with a correct understanding and interpretation of the Religion Clauses of the First Amendment — but that, in addition, it would bring to fruition, at long last, the "sacred promise of equal educational opportunities for all American schoolchildren" that the Court made to the American people in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Br. for Taylor Petitioners, No. 00-1779 [hereinafter, "Pet. Br."] at 4-5.

If this assertion were even faintly well-founded, it would be a powerful practical encouragement to a decision in favor of Petitioners. The *Brown* ruling is regarded by nearly all commentators and observers of the American judicial system as the most important decision of this Court in the twentieth century. The Court and its members have expressed both continued support for its core holding and an appreciation of the difficulties that have attended its effectuation. *E.g.*, *Freeman v. Pitts*, 503 U.S. 467, 505 (1992) (Scalia, J., concurring) ("[W]e must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences."); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13-14 (1971) (referring to history of "[d]eliberate resistance of some to the Court's mandates" and "the dilatory tactics of many school authorities").

The Court has further recognized the fact that the effects of long-maintained racially dual school systems in this nation have not been fully extirpated, *e.g.*, *Freeman v. Pitts*, 503 U.S. at 495 ("In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And

stubborn facts of history linger and persist."), even in situations in which practical remedies to excise them fully no longer exist, *see id.*, 503 U.S. at 491-92 ("[W]ith the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision.").

Thus, were there reason to believe that modifying well-established First Amendment principles would have the ancillary effect of bringing about substantial and lasting improvement in the educational opportunities of African-American pupils in this country, that would inevitably constitute a subtle — but hardly insubstantial — consideration for members of this Court, which must decide whether there is adequate justification for altering its interpretation of the Religion Clauses.[1] But the premise and conclusion are wrong.

---

[1]Taylor Petitioners are careful to eschew a direct appeal to this Court on such grounds: "Petitioners do not ask this Court to endorse parental choice as a matter of public policy, nor would it be proper for the Court to do so." (Pet. Br. at 6). But they follow that statement immediately with the suggestion that if the Court determines that the First Amendment, properly construed, requires reversal, "the Court will affirm good-faith efforts directed toward the *constitutional imperative* of extending educational opportunities to children who need them desperately." (*Id.* at 7 (emphasis added)). This is patent rhetoric and exhortation, not just a demonstration of "context" (see *id.* at 25), and it requires a response.

I

The Voucher Program Involved In This Action Was Neither Designed, Nor Can It Operate, To Fulfill The Promise Of *Brown* For African-American Pupils In The Cleveland Public Schools, The Same Class Of Students Found By The Federal Courts To Have Suffered From Long-Maintained *De Jure* Segregation In The Cleveland Public Schools

Taylor Petitioners characterize this matter as closely reflective of the themes and issues raised in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Br. at 49), analogizing the situation of African-American children in this country prior to *Brown* — subject to the most pernicious forms of official racial discrimination — with the limitations that are imposed by the Constitution on public support for students to attend private schools.[2] The analogy is not merely manipulative[3] and

---

[2]"[In *Brown*], children were forced to travel past good neighborhood schools to attend inferior schools because the *children happened to be black*; today, many poor children are forced to travel past good schools to attend inferior schools because the *schools happen to be private*." (Pet. Br. at 49) (emphasis added).

[3]For example, Taylor Petitioners mislead the Court when they represent that a greater proportion of voucher recipients are African-American students than are Cleveland public school students taken as a whole (Pet. Br. at 27, citing J.A. 215a-216a). The figures given on those pages come from a 1999 study of the Cleveland voucher program, *see* J.A. 216a n.9, but the percentages reported in that study are based on *surveys* of a *sample* of 505 parents of voucher recipients and 327 parents of public school students, not upon an enumeration of all Cleveland public school and voucher program pupils. Joint Appendix, Vol. IV, at 965, 977,

shallow; it is insulting to the thousands of courageous African-

---

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000). In fact, Taylor Petitioners themselves submitted an affidavit in support of their motion for summary judgment in the trial court reporting that "[s]lightly over 70% of the students in the Cleveland City School District are African-American" (Joint Appendix, Vol. II, at 468 ¶ 11, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000)), and this figure is supported by a separate study which found that 53 per cent of the students in the voucher program were black, compared to 71 per cent of students in the public schools. Piet van Lier & Caitlin Scott, *Fewer choices, longer commutes for black voucher students*, CATALYST FOR CLEVELAND SCHOOLS, Oct/Nov 2001, <http://www.catalyst-cleveland.org/10-01/1001extra4.htm> (visited Nov. 27, 2001).

It is also a distortion of the record in this case to suggest that most of the students participating in the Cleveland voucher program are attending "good" schools closer to their residences than "inferior" public schools to which they would otherwise be assigned. Piet van Lier & Caitlin Scott, *Fewer choices, longer commutes for black voucher students*, CATALYST FOR CLEVELAND SCHOOLS, Oct/Nov 2001, <http://www.catalyst-cleveland.org/10-01/1001extra4.htm> (visited Nov. 27, 2001) ("The Cleveland school district is required to provide or pay for transportation of all voucher students who live more than a mile from the school they attend. About 75 percent of students using vouchers are eligible for district transportation service because they live a mile or more from the school they attend, estimates Mark Cegelski, planning manager for the district's transportation department. . . . [S]ome voucher students are bused across the district on special runs that take as long as an hour-and-a-half and include as many as three voucher schools, says Cegelski. In contrast, the district's return to neighborhood schools in 1998 after the desegregation order was lifted, has meant shorter bus rides for most public school students, transportation department officials says [*sic*].").

American parents and students who made this Court's *Brown* decision become a reality, in the face of determined official and public resistance. Moreover, the Taylor Petitioners' suggestion that the impediment to public funding of pre-collegiate private educational institutions that is created by the Establishment Clause is the major barrier today to providing equal educational opportunities for African-American and other children of color in this country, is entirely unconvincing.

For many years, African-American students in the Cleveland public schools were the victims of intentionally discriminatory policies that isolated them in racially segregated school facilities and limited their access to high-quality educational opportunities. *Reed v. Rhodes*, 422 F. Supp. 708, 793 (N.D. Ohio 1976), *remanded per curiam*, 559 F.2d 1220 (6th Cir. 1978), *supplemental opinion on remand*, 455 F. Supp. 569 (N.D. Ohio 1978), *aff'd in relevant part and remanded on other grounds*, 607 F.2d 714 (6th Cir. 1979), *cert. denied*, 455 U.S. 935 (1980). *See id.*, 422 F. Supp. at 793 (state requirements for minimum number of hours devoted to instruction per day waived in predominantly black schools); *Reed v. Rhodes*, 662 F.2d 1219, 1226 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (same); *Reed v. Rhodes*, 455 F. Supp. 546, 565 (N.D. Ohio 1978) (inferior facilities and educational offerings at predominantly black high school), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Reed v. Rhodes*, 455 F. Supp. 569, 598-99 (N.D. Ohio 1978) (lower reading scores of black students are "mainly a result of differing racial treatment" by school system), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). Today, these students and their successors constitute more than 70% of all pupils in the Cleveland public school

district,[4] but the "stubborn facts of history linger and persist," *Freeman*, 503 U.S. at 492. Taylor Petitioners themselves document the severe educational and operational problems that beset the Cleveland public schools. *See* Pet. Br. at 25-26.

In these circumstances, the fact that some African-American parents in Cleveland have taken advantage of the proffered opportunity for their children to attend non-public schools that are not similarly stigmatized as ineffectual or burdened is hardly surprising. But the issue before the Court is not dependent on an assessment of the degree of benefit the program offers the limited number of individual African-American and other Cleveland students who have been able to take advantage of the chance to attend non-public schools. Rather, the issues in this case must be judged in the context of a system erected by the Ohio Legislature that at once promises to breach a line of separation between sectarian schools and the public fisc that has long been a part of our nation's basic constitutional fabric — and also is inescapably inadequate to deliver on *Brown*'s promise of public education free of racial discrimination, and of "equal educational opportunity" for minority children, *see* 347 U.S. at 493 ("Where the state has undertaken to provide [an opportunity for public education], it is a right which must be available to all on equal terms.").

On that score, the numbers are telling. No matter how great the level of interest, only a small fraction of the African-American and other minority students, whose only real option

---

[4]Joint Appendix, Vol. II, at 468 ¶ 11, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (Oct. 26, 1999 affidavit of Howard Fuller submitted by Taylor Petitioners to district court in support of their motion for summary judgment). The lower figure cited in Pet. Br. at 27 (45.9 per cent) is based upon a *sample* of 327 parents of students in Cleveland public schools in 1998, not a count of all public school pupils. See *supra* note 3.

is to attend the public schools of Cleveland, can be selected to receive scholarships to attend non-public facilities under the Legislature's program. This is so despite the fact that the purpose of the program, according to Taylor Petitioners, is to help solve the massive educational problems in that city.[5]

Under the voucher plan involved in this case, students whom a local superintendent concludes are eligible because they come from a low-income family are given a *third* priority in admission to private schools, after "[s]tudents who were enrolled in the school during the preceding year" and siblings of such students. The third priority preference operates only until students from low-income families constitute 20 per cent of the total number of students in a particular grade — as determined by enrollment figures for that grade in the previous year. Once that proportion is reached, "[a]ll other applicants residing anywhere," including, presumably, children from higher-income families (as well as those from low-income families who were not admitted under the third priority category) are eligible to be selected by lottery to receive a voucher. OHIO REV. CODE § 3313.977.

The results of this structure are not surprising. One report found that nearly 33 per cent of the students participating in the Cleveland voucher program had previously attended private schools, while only 21 per cent had gone to public

---

[5]*See* BRIAN P. GILL, MICHAEL TIMPANE, KAREN E. ROSS, AND DOMINIC J. BREWER, RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS xviii, 52, 213-14 (Rand Corp. 2001), available at http://www.rand.org/publications/MR/MR1118 (visited Dec. 9, 2001) (hereinafter cited as "RHETORIC VERSUS REALITY") (Cleveland's voucher program is an "escape valve" program, "i.e., targeted to a smaller number of at-risk children." "Such programs will not be the silver bullet that will rescue urban education.").

schools in Cleveland before receiving vouchers. The remaining 46 per cent of participants came from outside the Cleveland district or enrolled as kindergartners — and of these latter pupils, "at least 216, or 6 percent of the total receiving vouchers, were previously enrolled in preschool at private schools that are now participating in the voucher program . . . suggest[ing] that at least 39 per cent of the students receiving aid came from a private school background." Zach Schiller, Policy Matters Ohio, *Cleveland School Vouchers: Where the Students Come From* (2001), at 2-3 (available at http://www.policymattersohio.org) (visited Dec. 4, 2001).

Such limited efficacy is not atypical. We are not aware of any voucher program that provides sufficient resources to make it possible financially for all, or even most, pupils attending public schools in large, urban systems who are from families of limited means to attend any private institution of their choice.

> No one in the voucher debate suggests that vouchers would provide unlimited choices. For example, no one suggests that vouchers would cover the full cost of any tuition set by the private school. Instead, vouchers would provide limited empowerment that would free individuals who already enjoy advantage to maximize that advantage. Both logic and historical experience suggest that vouchers will exacerbate existing inequity.

Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 404 (1997) (footnotes omitted). *Accord*, RHETORIC VERSUS REALITY, *supra* note 5, at 145 ("Vouchers that fall short of tuition costs will have much lower take-up rates among low-income families than will more generous vouchers").

In short, the Legislature's voucher program may coincidentally offer some increased educational opportunities

for the fortunate few students selected by lot to participate in it, but it also represents a deliberate decision not to focus the State's resources on the larger group of children whose educational circumstances are so severely limited.

The Court should, then, understand the "context" of this matter with precision. The program at issue is *not* one which offers any promise, or even hope, of achieving "equal educational opportunities" for the scores of thousands of African-American and other minority students in the Cleveland public schools. Instead, it is a device to open the doors for public support of pervasively sectarian pre-collegiate educational institutions while ignoring the desperate educational plight of the mass of African-American and other minority students for whose benefit *Brown v. Board of Education* was brought and litigated.[6]

---

[6]It is particularly ironic for Taylor Petitioners to advance considerations of unequal educational outputs by poor and minority students and a heavily poor and minority school system in support of reversing the judgment below. Similar arguments have been consistently rejected by this Court over the past generation and a half when they were advanced, not by private schools or their students, but by poor and minority parents and students themselves, whether in the school finance context, *see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), or in the school desegregation context, *see, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995).

II

Private School Tuition Voucher Programs Such As The One Involved In This Case Contain The Seeds Of Educational Resegregation And Lack Safeguards To Prevent This Result

While the Cleveland voucher program is too limited to offer any realistic promise of affording equal educational opportunities to all of the city's African-American schoolchildren, nothing in Petitioners' reading of the Religion Clauses would require Ohio to achieve the goal they ascribe to the program in order to preserve its constitutionality. At the same time, the voucher program may — especially if its targeting provisions are relaxed by the state in the future — provide a vehicle for resegregating schooling in the Cleveland area along racial lines; and nothing in Petitioners' reading of the Religion Clauses would prevent Ohio from modifying the program in this direction. Thus, not only does the program fail to deliver on *Brown*'s promise of equal educational quality, but it raises the spectre of restoring the very evil against which *Brown* was directed: state-sponsored racial separation.

Cleveland's voucher program, limited as it may be at the present time, already has facilitated white student attendance at non-public schools in Cleveland in proportions that exceed their representation in the public system. See *supra* note 3 (white participation rate in voucher programs greater than white share of Cleveland public schools' enrollment). None of the predominantly white suburban school systems surrounding the city participate in the program. And the limits on tuition payment that the courts below found had the primary effect of directing state support overwhelmingly toward sectarian institutions also serve to suppress minority

enrollment, given the powerful association between race and poverty attributable to this country's long history of official racial discrimination. *See* Brief for the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Respondents, *Adarand Constructors, Inc. v. Mineta*, 2000 U.S. LEXIS 10814 (U.S. November 27, 2001) (No. 00-730).

These operational characteristics of the voucher plan will only be accentuated and increased if the program is expanded,[7] especially if the limited income guidelines and priorities that now exist, see *supra* at 10, are relaxed in the future,[8] allowing the voucher program to become as effective a resegregation tool as tuition grants could have been in the 1950's and 1960's but for the rulings of this Court and lower federal courts.[9]

---

[7]*See* RHETORIC VERSUS REALITY, *supra* note 5, at xix ("[L]arge-scale choice programs (whether voucher or charter) are more likely to undermine school-level integration than are escape-valve vouchers that put low-income children in existing private schools.").

[8]*See id.* at 174 ("In sum, these findings about parental preferences suggest that unconstrained choice in a voucher or charter program could lead to higher levels of stratification").

[9]*See* Molly Townes O'Brien, 64 TENN. L. Rev. at 386 & n.179 (citing *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Griffin v. State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969); *Brown v. South Carolina State Board of Education*, 296 F. Supp. 199 (D.S.C.), *aff'd per curiam*, 393 U.S. 222 (1968); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967)).

Parents of poor and minority schoolchildren have no illusion that school reform and educational quality are, in the first instance, matters lending themselves to judicial resolution. But the judiciary (including specifically this Court) has played a critical role in addressing practices that perpetuate the effects of the racially discriminatory policies of the past, including their impact upon educational quality, *cf. Freeman v. Pitts*, 503 U.S. at 492 (quality of education offered minority students is appropriate factor to be considered in determining whether past vestiges of discrimination had been eliminated to the extent practicable); *Missouri v. Jenkins*, 515 U.S. at 101 ("The basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior *de jure* segregation has been remedied to the extent practicable"). This case presents another occasion on which the Court must provide such leadership.

LDF or the NAACP represented the plaintiff schoolchildren in the five cases that constituted *Brown v. Board of Education* and many of the major cases aimed at implementing *Brown*'s promise, from *Cooper v. Aaron*, 358 U.S. 1 (1958) through this Court's most recent desegregation decision, *Missouri v. Jenkins*, 515 U.S. 70 (1995). While we have won significant victories (including in *Brown*, *Cooper*, *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979)), we and others seeking to integrate public schools within the United States have also faced formidable obstacles. For example, this Court has limited the circumstances, means, and duration of desegregation remedies. *E.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974); *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503

U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995). And in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), this Court foreclosed federal constitutional challenges to property tax-based school funding systems that produce severe resource inequality between wealthier and poorer districts.

Currently, opponents of school desegregation do not stop at advocating further limitations on the role of the judiciary; they argue that *any* consideration of race, even in the context of facilitating *voluntary* desegregation, is unconstitutional, *see, e.g.*, *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Tuttle v. Arlington County School Board*, 195 F.3d 123 (4th Cir. 1999); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 146 L. Ed. 2d 312 (2000), and even in the case of a school system that was long operated on a *de jure* segregated basis. *See Cappachione v. Charlotte-Mecklenburg Schools*, 57 F. Supp. 2d 228 (W.D.N.C. 1999), *aff'd in part and rev'd in part en banc sub nom. Belk v. Charlotte-Mecklenburg Board of Education*, 2001 U.S. App. LEXIS 10712 (4th Cir. 2001).

Ironically, in the present cases, the Petitioners *invoke* race, by referring to the "sacred promise" of *Brown*, to support the constitutionality of a voucher program that, as discussed above, offers not integration, but further racial separation in publicly funded education.[10]

---

[10] *Cf. Griffin v. State Board of Education*, 296 F. Supp. at 1181 (emphasis in original):

> To repeat, our translation of the imprimatur placed upon *Poindexter* by the final authority is that *any* assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution. In our judgment, it follows,

This Court should act to prevent the establishment of separate private, predominantly white educational systems and public, predominantly minority educational systems by rejecting the Taylor Petitioners' invocation of *Brown*.

> that neither [illegible]ve nor purpose is an indispensable element of the breach. The *effect* of the State's contribution is a sufficient determinant, with effect ascertained entirely objectively.

Conclusion

For the reasons given above, as well as those urged by Respondents, the judgment below should be affirmed

Respectfully submitted,

KIMBERLY WEST-FAULCON
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
Suite 1480
1055 Wilshire Boulevard
Los Angeles, CA 90017
(213) 975-0211

DENNIS COURTLAND HAYES
GENERAL COUNSEL
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive, 5th Floor
Baltimore, MD 21215
(410) 486-9191

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
*NORMAN J. CHACHKIN
JAMES L. COTT
DENNIS D. PARKER
ELISE C. BODDIE
LIA B. EPPERSON
DEREK R.B. DOUGLAS
DAMON T. HEWITT
CHINH Q. LE
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013-2897
(212) 965-2200

*Counsel of Record
Counsel for Amici Curiae